No. 16 T.

In the Supreme Court of the United States

OCTOBER TERM, [illegible] 1957

GLENN O'CONNOR YATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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CITATIONS

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No. 15

OLETA O'CONNOR YATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 42–48)[1] is reported at 227 F. 2d 851.

JURISDICTION

The judgment of the Court of Appeals was entered on July 26, 1955 (R. 48), and a petition for rehearing was denied on November 2, 1955 (R. 49). The

[1] "R." refers to the record in the case at bar, which bore docket No. 13541 in the Court of Appeals. Petitioner has also filed with the Court the records in two related contempt proceedings involving her—one civil (Court of Appeals docket No. 13527) and the other criminal (Court of Appeals docket No. 13535). See *infra*, pp. 5 (fn. 3), 8–11, 20–31, 35–36. We shall have occasion to refer herein to the former of these records. It will be designated by the abbreviation "R., No. 13527."

petition for a writ of certiorari was filed on November 30, 1955, and was granted on January 16, 1956 (R. 49). 350 U. S. 947. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner's several refusals to answer the questions constituted, in the circumstances of this case, multiple contempts or but a single contempt; and whether, if the latter, the court acted within its power in sentencing petitioner to a definite period of imprisonment for criminal contempt for one group of refusals after having previously sentenced her to an indefinite period of imprisonment, in a civil contempt judgment, for an earlier group of refusals.

2. Whether the court's purpose in sentencing petitioner to imprisonment in the criminal contempt judgment here involved was primarily that of punishing petitioner, in vindication of the authority of the court, for her past contemptuous conduct, or whether its primary purpose was to coerce her into future compliance for the benefit of the Government as prosecutor.

3. Whether the sentence to one year's imprisonment was a reasonable penalty under all the circumstances and within the admittedly discretionary authority of the court to impose, or whether it constituted cruel and unusual punishment within the proscription of the Eighth Amendment.

STATUTE AND RULES INVOLVED

18 U. S. C. 401 provides in pertinent part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority and none other, as—
>
> * * * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rules 35 and 42 of the Federal Rules of Criminal Procedure (18 U. S. C. following § 3771) provide in pertinent part:

> RULE 35. CORRECTION OR REDUCTION OF SENTENCE
>
> * * * The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.
>
> RULE 42. CRIMINAL CONTEMPT
>
> (a) *Summary Disposition.*
>
> A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.
>
> * * * * *

STATEMENT

On July 8, 1952, Judge William C. Mathes of the United States District Court for the Southern District of California, pursuant to Rule 42 (a) of the Federal Rules of Criminal Procedure (*supra,* p. 3), signed an "Order, Judgment and Certificate of Criminal Contempt" (R. 3–15) certifying that petitioner, on June 30, 1952, while testifying on her own behalf at a criminal trial presided over by him, had in his presence, and in disobedience of his specific instructions, refused to answer a series of "proper and relevant questions put to her on cross-examination" (R. 3), in violation of 18 U. S. C. 401 (*supra,* p. 3). The questions asked, together with petitioner's refusals to answer, were set forth in the order in eleven numbered specifications (R. 3–14).

On August 8, 1952, following the termination of the trial at which the refusals to answer had occurred, Judge Mathes, pursuant to the authority conferred by the same Rule 42 (a), *supra,* summarily adjudged petitioner guilty of, and sentenced her to one year's imprisonment for, each of the eleven contempts as set forth in the specifications, the terms to run concurrently (R. 16–18).[2] On appeal to the Court of

[2] These concurrent sentences were ordered to commence upon the expiration of a five-year sentence (R. 17–18), which had been previously imposed for the offense for which she was on trial when the contempts took place, and of which she had been found guilty a few days earlier.

Appeals for the Ninth Circuit, the judgment of conviction was affirmed (R. 48).[3]

The pertinent facts may be summarized as follows:

The offense for which petitioner was on trial when the contempts in issue occurred was conspiracy to violate the Smith Act. Thirteen co-defendants were on trial with her.[4] The indictment alleged that they, together with twelve named but unindicted co-conspirators[5] and "other persons to the grand jury unknown", had conspired to advocate and teach the duty and necessity of overthrowing by force and violence the Government of the United States, and to organize as the Communist Party of the United States an organization which so advocates and teaches, all with the intent of causing such forcible overthrow as speedily as circumstances would permit (2 Tr. 226–234).[6] The trial extended from February 5 to August 5, 1952 (2 Tr. 236, 106 Tr. 13897).

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[3] Simultaneously with its affirmance of the judgment in the instant case, the Court of Appeals decided two related contempt cases against petitioner, one involving a civil and the other a criminal judgment. The civil judgment was affirmed in part and reversed in part. *Yates* v. *United States*, 227 F. 2d 844. The criminal judgment was reversed. *Yates* v. *United States*, 227 F. 2d 848. The civil judgment is indirectly involved in the case at bar. See *infra*, pp. 8–11, 20–31.

[4] The convictions of all fourteen of these defendants on the Smith Act charge are the subjects of cases Nos. 6, 7, and 8, this Term (*Yates et al.* v. *United States*, *Schneiderman* v. *United States*, and *Richmond et al.* v. *United States*, respectively).

[5] These were the defendants in the *Dennis* case. *Dennis* v. *United States*, 341 U. S. 494.

[6] "Tr." will be used to refer to the reporter's transcript of the record in the Smith Act conspiracy trial, copies of which are on file with the Court in connection with pending cases Nos. 6, 7, and 8 (see fn. 4, *supra*).

The refusals to answer which are the subject of the instant case occurred on June 30, 1952, the third day of petitioner's cross-examination. On June 26th, the first day of her cross-examination, similar refusals had occurred, these being the contempts involved in the related contempt proceedings decided by the Ninth Circuit but which have not been brought here (see fn. 3, *supra,* p. 5). However, since these earlier refusals are indirectly involved in the present case, it is necessary to relate briefly the circumstances surrounding them before coming to the specific refusals now involved.

Following the completion of the Government's case in chief, all except four of the defendants—petitioner, Loretta Stack, Frank Carlson, and William Schneiderman—rested their cases without putting in any evidence (75 Tr. 10074–10075). Thereupon, petitioner—the only defendant to do so—took the stand in her own defense (76 Tr. 10159). She admitted that she was the Organizational Secretary of the Communist Party of California (85 Tr. 11228). This was the next to the highest executive position in the California Party (4 Tr. 449), second only to that of State Chairman, the position occupied by Schneiderman (85 Tr. 11229). In the course of her direct testimony petitioner testified, among other things, that she had never agreed or conspired with anyone to advocate the forcible overthrow of this Government; that the Communist Party had never so advocated or had any such purpose according to her understanding of its teachings, tenets, and program; and that she person-

ally had never had any intent to effect such forcible overthrow (80 Tr. 10703, 83 Tr. 11099, 84 Tr. 11159–11160).

The refusal of June 26th (morning session).—On the morning of June 26, 1952, following nine days of direct testimony, petitioner's cross-examination began (85 Tr. 11228). In reply to questions of the prosecutor, she testified that her co-defendant Schneiderman was the Party's California State Chairman (85 Tr. 11229); that prior to her arrest in 1951 she had often met with other Party leaders at the Party's Los Angeles headquarters in connection with her Party duties (85 Tr. 11231–11233); and that among the leaders with whom she had thus conferred was co-defendant Carlson (85 Tr. 11233).

She was then asked "[w]ho else * * * of the defendants" she had met with at these headquarters in connection with her Party duties (85 Tr. 11234). She refused to answer this question, stating that she was (85 Tr. 11234–5)—

> * * * not willing to provide names and identities of people other than those that I have indicated, because I believe that in the case of the other defendants their case is already rested and I would only be contributing toward adding to the prosecution case against them, and I think that that would be becoming a government informer and I cannot do that. * * * I am not willing to do anything that is going to harm the defense of other people and * * * open up the door for persecution and harassment of other people.

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Upon being directed by Judge Mathes, the presiding judge, to answer the question, she persisted in her refusal, notwithstanding her understanding of the "possible consequences" of such refusal (85 Tr. 11239). The matter was not further pursued at the morning session.

The refusals of June 26th (afternoon session), leading to the civil contempt judgment.—In the afternoon session of the same day, June 26, 1952, petitioner was asked four additional questions (R., No. 13527, pp. 3–7) which she declined to answer after being instructed to do so by the court, for which refusals she was adjudged in civil contempt.

The first question was whether petitioner, at any time since she had been a member of the Communist Party, had ever known one Harry Glickson—an individual whose name had figured prominently in the Government's evidence as an important co-conspirator of the defendants on trial[7]—to be a Party member (R., No. 13527, p. 3; 85 Tr. 11312). Petitioner had given direct testimony relating to Glickson (see 85 Tr. 11309–11310) and had previously admitted on cross-examination that she was personally acquainted with him (85 Tr. 11310). Nevertheless, she refused to state whether or not she knew Glickson to be a Communist

[7] The evidence indicated that Glickson had been a prominent Party member operating in the San Francisco area, the area with which petitioner herself was most closely identified (33 Tr. 4425–4447; 34 Tr. 4462–4488; 36 Tr. 4707–4708, 4739, 4742; 37 Tr. 4762, 4777, 4780, 4812, 4825, 4836–4844; 38 Tr. 4909, 4911; 51 Tr. 6593–6594).

on the ground that (R. No. 13527, pp. 3–4; 85 Tr. 11312)—

> * * * that is a question which, if I were to answer, could only lead to a situation in which a person could be caused to suffer the loss of his job, his income, and perhaps be subjected to further harassment, and in a period of this character, where there is so much witch-hunting, so much hysteria, so much anti-communism, I am sorry I cannot bring myself to contribute to that.

Upon being instructed by the court to answer the question, she persisted in her refusal, for which she was pronounced "in contempt" (85 Tr. 11312–11313).

The second and third questions to which petitioner refused answers on this occasion were likewise concerned with Glickson and were similar in character except that they referred to particular periods of time (R., No. 13527, pp. 4, 5; 85 Tr. 11313–11315). In refusing to answer, petitioner further elaborated upon her reasons. She stated (R., No. 13527, p. 6; 85 Tr. 11315):

> However many times I am asked and in however many forms, to identify a person as a communist, I can't bring myself to do it, because I know it means loss of job, * * * persecution for them and their families, * * * [and] even opens them up to possible illegal violence, and I will not be responsible for that.

The fourth and final question was whether it was not true that Frank Spector, a co-defendant who had previously rested his case (see *supra,* p. 6), had been

elected at the Party's 1950 California State Convention to be a delegate to its National Convention of that year (R., No. 13527, p. 6; 85 Tr. 11316–11318). Petitioner had, only a moment previously, testified readily that her co-defendants Schneiderman and Stack had been delegates to this State Convention, explaining that Schneiderman had, and that Stack had not, been elected at the convention as a delegate to the National Convention (85 Tr. 11317–11318). But on being asked the same question regarding Spector, she refused to answer, stating, as she had previously said at the morning session (see *supra*, p. 7), that she would not be an "informer" against "defendants who have rested their case, and do not propose to put on any further defense" (R., No. 13527, p. 7; 85 Tr. 11319).

At the conclusion of the afternoon session, Judge Mathes inquired of petitioner whether she was "prepared at this time to purge [her]self" of her several contempts committed during the session (85 Tr. 11367). When petitioner replied that she was not (*ibid.*), the judge directed, in a civil contempt judgment (R., No. 13527, pp. 3–8), that she "be committed to the custody of the United States Marshal * * * until such time as she may purge herself of the contempts by answering the questions * * * or until further order of the Court" (*id.*, p. 8; 85 Tr. 11372–11373). Petitioner never sought to purge herself

of these contempts and remained in custody for the balance of the trial.[8]

The refusals of June 30th, leading to the criminal contempt judgment involved at bar.—On June 30, 1952, while still under cross-examination, petitioner refused to answer, after being instructed to do so by the court, eleven additional questions put to her by the prosecutor (Specifications I–XI, R. 3–14), for each of which refusals she was adjudged guilty of criminal contempt. These are the refusals directly involved in the contempt judgment now before the Court.

Specifications I–III (R. 3–5) each involve a question relating to one Leon Kaplan, who was identified by government witnesses as a high-level participant in Communist Party affairs in San Francisco.[9] Specifi-

[8] The trial ended on August 5, 1952. Thereafter, until August 30, 1952, all of the defendants in the main case, including petitioner, were confined under the judgments of conviction in that case. On the latter date, all were released on bail. From September 3 to September 6, 1952, petitioner was again confined pursuant to the civil contempt order of June 26th (see text, *supra*). On the latter date she was released on bail pending appeal from the order directing her reconfinement. This order was later reversed on the ground that, the jury having been discharged, compliance with the trial court's orders directing the answering of the questions involved was no longer possible. *Yates* v. *United States*, 227 F. 2d 844. From September 8 to September 11, 1952, petitioner was again confined, this time pursuant to a criminal contempt judgment based upon the same refusals to answer as those on which the civil contempt order had been based. On the latter date she was released on bail pending appeal from that judgment, which was also later reversed. *Yates* v. *United States*, 227 F. 2d 848.

[9] See, *e. g.*, 42 Tr. 5438–5444, 5453–5454; 59 Tr. 7903, 7930; 60 Tr. 8023, 8025, 8026, 8028, 8037.

cations IV, V, and XI (R. 5–8, 13–14) involve questions relating to three other individuals who had figured prominently in government testimony as Party members and co-conspirators, namely, Ida Rothstein, Herschel Alexander, and Celeste Strack, respectively. Specifications VI–X (R. 8–13) involve questions relating to co-defendants of petitioner who had previously rested their cases (see *supra,* p. 6), namely, Al Richmond, Dorothy Healey, Frank Spector, Ernest Fox, and Albert Lima, respectively.

In each of the eleven instances, the question asked was either whether the person referred to was known to petitioner as a member of the Communist Party, or it was otherwise of such a character that petitioner, by replying, must needs have indicated whether or not the person named was known to her as such. Petitioner had no hesitancy in testifying that she knew the various individuals mentioned (see, *e. g.,* R. 4, 5, 6, 13–14), but she refused, as she had on June 26th with respect to other persons, to state whether or not she knew them to be Communists. In so doing, however, she shifted the grounds of her refusal with respect to all individuals other than co-defendants. While on the former occasion she had announced categorically that she would under no circumstances "identify a person as a communist" (*supra,* p. 9), on this occasion she drew certain distinctions concerning, and attached certain qualifications to, her previously-expressed attitude. She now limited the persons whom she refused to identify as Communists, though known to her as such, to persons who in her judgment could "be hurt

by" such testimony, or members of whose families could thus be hurt.

"I feel", she explained, "that these people are in a position where my identification of them as communists would do them an inestimable amount of damage" by "harming their ability to make a livelihood" or "hurting their families" (87 Tr. 11618). She was quite willing, however, she said, to "give the names of people whom I know I cannot hurt" (*ibid.*). For example, she was "willing to name people who may have died," she said (R. 7; 87 Tr. 11623), and in fact she did name as a Communist, in response to a prosecution question, at least one deceased person, one "Mike Quin" (87 Tr. 11595). Even with respect to deceased persons, however, she qualified her expressed willingness to testify with respect to their Communist affiliations with the proviso that to do so would not, in her judgment, hurt their "families" (*ibid.*; and see 87 Tr. 11618–11619). In the case of living persons who were "employed by the Communist Party", she agreed that such persons would not personally be injured—by being "discharged" and thus losing their "livelihood[s]"—if she identified them as Communists (87 Tr. 11618–11619). She pointed out, however, that "members of their families" might suffer "in many different ways" as the result of such testimony on her part (87 Tr. 11619), with the consequence that even with respect to such persons she would have to consider the facts in each case before deciding whether she would be willing to testify concerning them.

For all these reasons, she made it clear, it was impossible for her to make any general statement as

to what persons, known to her as Communists, she would be willing to identify as such in response to prosecution questions; she would have to decide in each instance whether such identification by her could hurt either the individual himself or some member of his family (R. 7; 87 Tr. 11618–11619, 11623).[10] The record does not reflect how close a "family" relationship would have to exist between a person known to her as a Party member, but whose identification as such by her could not in her judgment hurt him personally, and another person who in her opinion could be hurt by such testimony, to have justified her in refusing to make the identification.

At the conclusion of the session, after the jury had been excused, the judge told petitioner and her counsel (87 Tr. 11634):

> I expect to treat the contempt[s] of the court committed by the defendant Yates in today's session as criminal contempt pursuant to Rule 42 (a) * * * and deal with them independently as far as punishment is concerned.

At the request of counsel, immediate action on the matter was deferred (87 Tr. 11634–11635).

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[10] For example, when she was asked whether "a Mr. Herschel Alexander" was a member of the Party's California State Committee for the year 1950, she replied, after admitting that she knew Alexander: "Well, that, again, comes into the same category. I can be asked 500 names, and if my identification of these people who are living people who can be hurt by my public identification of them, as they can be, then I cannot answer it. I am willing to name people who may have died, whose families cannot be —" (R. 6–7; 87 Tr. 11623).

The contempt adjudication and sentence.—On July 8, 1952, the court signed the criminal contempt certificate certifying the facts concerning the above-recounted refusals by petitioner to answer questions on June 30th (R. 3–15). See *supra,* p. 4. On August 5, 1952, the jury returned its verdict of guilty in the principal case against petitioner and each of her co-defendants (106 Tr. 13866–13873), and on August 7th she was sentenced to five years' imprisonment and to pay a fine of $10,000 in that case (108 Tr. 14154–14155). On the following day, August 8, 1952, as previously noted (see *supra,* p. 4), petitioner was adjudged guilty of criminal contempt for each of her eleven refusals to answer on June 30th, and was sentenced to one year's imprisonment on each specification, the terms to run concurrently with one another but consecutively to her five-year sentence in the principal case (R. 16–18).

In the course of a colloquy with counsel for petitioner immediately preceding the imposition of sentence, the judge remarked to counsel that he (R. 27)--

> * * * had hoped by this time that Mrs. Yates might be willing to purge herself * * *.

Counsel for petitioner pointed out to the judge that it was no longer possible for petitioner to purge herself since, "the trial having been completed", "her answering the questions at this point" could not possibly "aid [the] jury" (R. 27). The judge replied

that, while that was true, it was nevertheless still within petitioner's power (R. 27–28)—

> * * * to purge herself to the extent that she bows to the authority of the court.
>
> Contempt is a defiance of the authority of the court and the authority of the court must be vindicated.
>
> It could have no effect upon this proceeding and need not be accepted as a purge, because of the fact that the time has passed, as you point out, Mr. Margolis, for the administration of justice in this case to be affected by it.
>
> Nonetheless, as I view it, the court, in its discretion, might treat answers now to the questions as a vindication of judicial authority and treat it as purged.

The question of the possibility of petitioner's "purging" herself even after the trial had been concluded was again adverted to in colloquy immediately following the imposition of sentence. The judge remarked at that time (R. 36–37):

> I hope Mrs. Yates will yet purge herself. I think, in offering to accept her answers now as a purge is [*sic*] a humane, merciful thing to do under the circumstances.
>
> I am not interested in imprisoning Mrs. Yates. I am interested in vindicating the authority of this court, which I feel must be vindicated when anyone wilfully refuses to obey a lawful order of the court.
>
> If she at any time within 60 days, while I have the authority to modify this sentence under the Rules, wishes to purge herself, I will be inclined even at that late date to accept her submission to the authority of the court.

SUMMARY OF ARGUMENT

I

This case does not involve, as petitioner claims, the multiplication of an essentially single offense into several crimes.

1. The judge was not precluded from invoking his *criminal* contempt powers with respect to petitioner's June 30th refusals by virtue of his having, on June 26th, invoked his *civil* contempt powers with respect to her refusals of the latter date, even if it be assumed with petitioner, *arguendo,* that her several refusals of both days constituted but one contempt. The purposes of a civil and of a criminal contempt sentence being essentially different—the one being coercive, the other punitive—one and the same contumacious act can be the subject both of a civil and of a criminal contempt judgment. *United States* v. *United Mine Workers,* 330 U. S. 258.

2. But petitioner's refusals to answer the various questions put to her on June 26th and June 30th did not constitute but a single, cumulative act of contumacy, as she contends. Her general statement of June 26th that she would under no circumstances identify as a Communist anyone about whom she was asked—even if consistently adhered to by her throughout her cross-examination, which it was not—amounted to no more than a blanket advance declaration of an intention not to be cooperative. A witness cannot effectively limit the sanction of contempt by general pronouncements as to the classes or types of question he will or will not reply to. The separate

questions which petitioner refused to answer were not mere variant repetitions of a single inquiry which petitioner had once refused to answer, but distinct and appropriate inquiries as to various individuals all of whom were separately important in the trial then underway. Petitioner's broad pronouncement of June 26th did not transform the prosecutor's subjects of inquiry from the Communist connections of the various individuals named in the questions into a single inquiry as to whether petitioner knew any Communists at all.

3. Furthermore, and equally important, it was never petitioner's "position" at the trial that, as she now claims, she would under no circumstances identify as a Communist anyone about whom she was questioned. Some persons she readily identified as Communists. The only objective test which she used in deciding whether she would or would not testify as to an individual's Communist Party membership had to do with her co-defendants:—With respect to co-defendants who had rested their cases, she refused to testify; with respect to the others, she readily admitted that they were Communists. With regard to all persons other than co-defendants, her self-imposed test of whether or not she would identify them as Party members was whether or not in her opinion she could "hurt" them (or members of their families) by so doing. In these circumstances, there were at least as many separate contempts as the number of persons concerning whom she was questioned (counting co-defendants cumulatively as one). On this basis her

contempts numbered at least six, of which some were committed on June 26th and some on June 30th.

II

The record clearly indicates that the principal if not the sole purpose of the contempt judgment here involved was to vindicate the authority of the court. This is the characteristic purpose of a criminal contempt judgment. The imposition of a criminal sentence was therefore proper. The judge's expression of hope at the time of sentencing that petitioner would yet "purge" herself was at most (since the trial at which her refusals had occurred was then over) an invitation for her to show regret for her contumacious conduct by answering the questions even at that late date—the judge indicating that, if she did that, he would shorten her sentence, or possibly even suspend its execution.

III

Petitioner's sentence to one year's imprisonment was not excessive in the light of her deliberate and repeated flouting of the authority of the court. When a defendant takes the witness stand, his waiver of immunity "is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing" (*Raffel* v. *United States,* 271 U. S. 494, 497). The record shows that petitioner sought to arrogate to herself the "management of the trial" (*United States* v. *Gates,* 176 F. 2d 78, 80 (C. A. 2)) with respect to all matters pertaining to her own cross-

examination. Her general attitude was one of defiance of the judge's authority. The amount of her punishment admittedly lay within the judge's discretion, and the sentence which he imposed was the product neither of haste nor of the heat of altercation. Nor was it excessive by the standards of statutory and case law.

ARGUMENT

I

THIS CASE DOES NOT INVOLVE, AS PETITIONER CLAIMS, THE MULTIPLICATION OF AN ESSENTIALLY SINGLE OFFENSE INTO SEVERAL OFFENSES

Petitioner's primary contention—a contention which she advanced for the first time in her petition for a writ of certiorari—is that her contumacious series of refusals constituted but one contempt in substance; and that this single offense was unwarrantedly proliferated, by an astute prosecutor and a willing judge, into multiple offenses by the device of repeating an essentially single question in a variety of forms (Pet. 19–20; Br. 25–39).[11]

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[11] Neither in her petition for certiorari nor at any prior stage of the case did petitioner deny that the questions she refused to answer were all relevant to the trial or that her refusals constituted at least one contempt. However, her brief on the merits contains a long section (Br. 40–50) arguing that the trial judge was not "warranted at all in holding that petitioner had committed a punishable contempt". This issue, not having been presented in the petition, is not properly before the Court (see Revised Rules, Rule 40 (1) (d) (2)).

In any event, the point has no substance. At a Smith Act conspiracy trial, it is certainly relevant to know whether the defendants are Communists and whether they consort with Communists. Petitioner insists that there was no dispute as to

"When the petitioner on the first day of her cross-examination made her position clear," according to the argument, "the prosecution could not multiply the contempts, and the court the punishments, by continuing to ask petitioner questions each time eliciting the same answer: her refusal to identify persons as members of the Communist Party" (Pet. 19–20; Br. 28–29, 35–36). Her "refusal was total on June 26," says petitioner, and "the imposition of punishment for the offense"—*i. e.*, the sentencing of petitioner on that date, in a civil contempt judgment, to

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the Communist character of the persons she was asked to identify (Br. 6, 8, 14, 42–4), but the prosecution could properly ask an admitted and knowledgeable Communist to confirm for the jury the Communist identity of those individuals and, if possible, to indicate the nature of their Communist activities. Moreover, petitioner had denied any participation in the conspiracy even though she associated with these persons, and it was therefore clearly relevant to show, through her own testimony, her knowledge of their Communist character (see R. 32; Pet. Br. 16). As a voluntary witness in her own behalf, she completely waived her privilege against self-incrimination even though cross-examination might be "inconvenient or embarrassing". *Raffel* v. *United States*, 271 U. S. 494, 497.

As for petitioner's claim of a legal immunity against "informing" (Br. 44–50), it is, of course, settled that there is no such privilege where the questions are otherwise proper. Cf. *On Lee* v. *United States*, 343 U. S. 747, 756–758; *Caminetti* v. *United States*, 242 U. S. 470, 492–5; *United States* v. *Dennis*, 183 F. 2d 201, 224–5 (C. A. 2), affirmed, 341 U. S. 494; *United States* v. *Kamin*, 136 F. Supp. 791, 799–800 (D. Mass.). Every day in the criminal courts witnesses with relevant testimony "inform" on defendants by revealing facts which help to convict those defendants; the testimony of accomplices or close associates, for example, is routine. Furthermore, it should not be forgotten that, by refusing to testify, petitioner was helping *herself* (not only others) by denying the prosecution the opportunity to disprove her disavowal of participation in the conspiracy.

remain in custody until she purged herself (see *supra,* pp. 10–11)—"exhausted the sentencing power of the court" (Pet. 22; Br. 39). Consequently, the argument concludes, her "refusal to answer similar questions on the same grounds on the identical subject matter" on June 30th "did not constitute a contempt of court separately punishable" (*ibid.*).

The contention is without merit. This case does not involve, as petitioner claims, an attempt by court and prosecutor to multiply an offense which was essentially single into several crimes. On the contrary, the case presents an instance of the proper application of established principles of the law of contempt.

1. In the first place, Judge Mathes, by directing that the criminal sentences of one year each which he imposed on petitioner for her June 30th refusals to answer eleven questions should be served concurrently (*supra,* pp. 4, 15), in fact treated her refusals of that day as in effect a single offense. The judge was not precluded from invoking his *criminal* contempt powers with respect to petitioner's June 30th refusals by virtue of his having on June 26th invoked his *civil* contempt powers with respect to her refusals of the latter date, even if it be assumed with petitioner, *arguendo,* that her several refusals of both days constituted but one contempt. The purposes of a civil and of a criminal contempt sentence are essentially different. The one is coercive and looks to the future, the other is punitive and looks to the past.[12] For this

[12] In civil contempt the sentence imposed is primarily coercive in character and purpose. It is intended to benefit a party to the litigation who has been damaged by the offender's contu-

reason, it is settled that one and the same contumacious act can be made the subject both of a civil and of a criminal contempt judgment. *United States* v. *United Mine Workers,* 330 U. S. 258, 303, 305; *Penfield Co.* v. *Securities & Exchange Commission,* 330 U. S. 585, 593–594; *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 441–443.

Even, therefore, if we assume what we do not grant in fact (see *infra,* pp. 24–30)—that petitioner's refusal to answer questions on both days constituted but a single contempt—it would still follow that the judge acted entirely within his power in invoking, with respect to that single contumacious act, the sanctions both of civil and criminal contempt. Incarceration under the civil sentence of June 26th was terminable at the will of petitioner, so that she carried "the key of [her] prison in [her] own pocket" (*In re Nevitt,* 117 Fed. 448, 461 (C. A. 8)). It was surely reasonable for the judge first to attempt to secure compliance with his orders by means of this mild sanction, and only later, when it had become apparent that the civil sentence was failing in its purpose, to resort to criminal punishment as a deterrent against

macy. A criminal contempt judgment, on the other hand, is primarily punitive in nature, being designed to "vindicate the authority of the court." See *United States* v. *United Mine Workers,* 330 U. S. 258, 302–305; *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 441–443. A person incarcerated under a civil contempt judgment can terminate his confinement at will by complying with the court's command. The period of confinement under a criminal contempt judgment, on the other hand, is of fixed duration. See *infra,* p. 32.

like offenses in the future and to vindicate the authority of the court. If petitioner were right that the imposition of the milder civil sentence totally exhausted the judge's powers both to coerce compliance and to vindicate the court's authority, it would follow that she had it within her power permanently to flout that authority at no greater risk than the suffering of the relatively mild inconvenience of spending the balance of the trial, then already far advanced, in the custody of the marshal. The law of contempt, we submit, contemplates no such possibility of "easy victory" for a recalcitrant contemnor. *Penfield Co. v. Securities & Exchange Commission,* 330 U. S. 585, 591–594.

2. But we do not agree that petitioner's refusals to answer the various questions put to her on June 26th and June 30th constituted but a single, cumulative act of contumacy, as she contends. She relies, of course, on the fact that she told the prosecutor and the judge on June 26th, the first day of her cross-examination, that "[h]owever many times [she was] asked" she would not "identify a person as a Communist" (Br. 9, 25, 36; see *supra,* p. 9). But this general statement on her part—even if consistently adhered to by her throughout her cross-examination, which it was not (see *infra,* pp. 27–30)—amounted to no more than a blanket advance declaration of an intention not to be cooperative. It could hardly preclude separate convictions for refusals to answer specific questions concerning the Party connections and activities of her various co-conspirators, who had been

identified as such by government witnesses. If petitioner were right, a witness could effectively limit the sanction of contempt by general pronouncements as to the classes or types of questions he would or would not reply to. But such a broad power to "pick and choose the questions to which he will give answer" has never, as pointed out by the court below, belonged to any witness (R. 47), and the courts have not hesitated to use their authority to quell continued defiance.

It is true that a witness' refusal to answer a certain question cannot be made the basis of multiple contempts by continuing to ask the same question in different forms (*United States* v. *Orman,* 207 F. 2d 148, 160 (C. A. 3); *United States* v. *Yukio Abe,* 95 F. Supp. 991, 992 (D. Haw.); *Fawick Airflex Co.* v. *United Electrical, Radio & Machine Workers,* 92 N. E. 2d 431, 436 (Ohio App., 1950); *Maxwell* v. *Rives,* 11 Nev. 213), just as it is true, on the same principle, that where a witness flatly refuses to testify at all his contempt cannot be multiplied by repeatedly asking him questions. *United States* v. *Costello,* 198 F. 2d 200, 204 (C. A. 2), certiorari denied, 344 U. S. 874.

But the principle on which these and other cases relied on by petitioner (Br. 32–34) rest has no applicability here. The separate questions which petitioner refused to answer were not mere variant repetitions of an inquiry which petitioner had once refused to answer. The questions did not "seek to establish but a *single fact,* or relate to but a *single subject of inquiry*" (*United States* v. *Orman, supra,*

207 F. 2d at 160 [emphasis added]); they rather sought to prove a number of facts and related to at least as many subjects as the number of persons referred to in the questions, *i. e.*, nine different persons (see *supra*, pp. 7–12).

Petitioner's broad pronouncement on June 26th (*supra*, pp. 7, 9) did not transform the prosecutor's subjects of inquiry from the Communist connections of the various co-conspirators named in the questions—matters thoroughly relevant to the trial at which petitioner was testifying (see fn. 11, *supra*, pp. 20–21)—into a single inquiry as to whether petitioner knew any Communists at all. If the latter had been the purpose of the prosecutor's questions, there might be some merit to petitioner's contention that her several refusals, though multiple in form, were but one in substance—at least if she had consistently adhered to her initially-expressed attitude throughout her cross-examination, which she did not (see *infra*, pp. 27–30). But it was obviously not the purpose of the prosecutor to seek to elicit by his questions whether petitioner, who had admitted in her testimony that she occupied the No. 2 post in the Communist Party of California (*supra*, p. 6), knew any Communists at all. Petitioner cannot properly claim, therefore, that the questions in issue were

simply repetitions of, or attempts to reframe in a variety of forms, a single inquiry.[13]

3. Furthermore, and equally important, it is not true that, as petitioner states (Br. 25–26), she apprised the court at the beginning of her cross-examination, and continued throughout the questioning to insist, that she "would not identify persons as members of the Communist Party no matter how many times she was asked" (Pet. 22). Here again, if the record supported this assertion of petitioner, there might be some ground—or at least we shall so assume—for her contention that her refusals, though plural in form, were but one in essence. But the fact is, as the Statement, *supra,* pp. 7–14, makes clear, that petitioner did not adhere to any such position during her questioning. As a matter of fact, though she did at one point *say* that she would under no circumstances identify a person as a Party member, the actual answers which she gave to questions, from the very beginning of her cross-examination, were completely inconsistent with that statement of "position".

Petitioner's "position" at the trial was not that she would not identify as members of the Communist Party *any* persons known to her as such. She freely

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[13] Petitioner distinguishes (Br. 39, fn. 21) the *Costello* case, 198 F. 2d 200 (C. A. 2), *supra*, p. 25 which held (*inter alia*) that separate refusals to testify on two different days constituted two contempts, on the ground that Costello's reasons for defiance differed somewhat on the two days. Certainly, if that mere difference supports Costello's convictions, petitioner cannot challenge her convictions based on separate inquiries as to a number of individuals, all of whom were significant to the Smith Act trial then in progress.

and without hesitancy, for example, identified as Party members her co-defendants Stack, Carlson, and Schneiderman (*supra,* pp. 7–10). She likewise willingly named as a Party member the individual identified in the record as "Mike Quin" (*supra,* p. 13). And she did the same in the case of Party leader Foster, an alleged but unindicted co-conspirator.[14] She declared her willingness, as we have seen, to identify as a member of the Party anyone known to her as such, provided the individual in question did not fall within one of the following categories: (1) those of her co-defendants—ten in number—who had previously rested their cases (*supra,* pp. 6–7), and (2) persons, living or dead, who—or members of the families of whom—could *in her judgment* "be hurt by" such testimony (*supra,* pp. 11–14). Whether or not a person came within the latter category was a decision which she made on a question-by-question, individual-by-individual basis.[15]

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[14] *Cf.* Judge Mathes' observation that he found it "difficult to reconcile her readiness to testify as to William Z. Foster and her unreadiness to testify as to the persons concerning whom she refused to answer, as a matter of principle" (86 Tr. 11383).

[15] For example, in replying to the prosecutor's question as to whether it was not a fact that "Mike Quin" was "during his lifetime * * * a member of the Communist Party", she said (87 Tr. 11595):

> Mike Quin is dead now and I do not believe that I can do him any harm, any damage. He is beyond that. And I am going to answer that question and say yes, he was, because Mike Quin was one of the people who was proudest of his membership in the Communist Party * * *.

The first of these categories was definite and objective enough, since the identity of the individuals in it was a matter of record; we may therefore assume at this point, *arguendo,* that petitioner's specific refusals to answer questions with respect to the individuals in that category constituted but one contempt. But the second of her categories was of a different character entirely. For there was manifestly no *objective* norm by which anyone could know whether a given individual came within it or not. Petitioner alone knew whether or not a named individual might meet the test she had laid down for herself. Neither the prosecutor nor the judge could possibly know in advance what petitioner's decision would be with respect to a given individual, and she made it clear to them that her decision in each case would depend upon her subjective appraisal of the person's circumstances. With petitioner thus arrogating to herself "the management of the trial" and determining for herself "what testimony to give and what to withhold" (*United States* v. *Gates,* 176 F. 2d 78, 80 (C. A. 2)), the prosecutor had no choice but to question petitioner on a person-by-person basis.

Wholly apart from the other reasons we have given (*supra,* pp. 22–27), there is thus no foundation in the record for petitioner's claim that an essentially single act of contumacy was unwarrantedly multiplied by court and prosecutor into multiple offenses. There were at least as many offenses as the number of persons—counting co-defendants cumulatively as one, for the reason stated (*supra,* pp. 28–29)—to whom the

prosecutor referred in the questions which petitioner refused to answer. In other words, petitioner's offenses—of which some were committed on June 26th and some on June 30th—numbered at least six.[16] Since even under petitioner's view (Pet. 22; Br. 39), two contempts are all that would be required to sustain the judge's action in sentencing her for criminal contempt in addition to civil contempt,[17] it follows that, for reasons wholly apart from and in addition to those previously discussed (*supra,* pp. 22–27), her challenge to that sentence cannot be sustained.

4. Petitioner invokes the genesis of, and the general course of decisions under, the federal contempt statute as a reason for holding that her contempt was at most single (Br. 29 *ff.*; 40 *ff.*). But nothing in that history teaches that Congress desired to deprive the courts of power effectively to deal with disobedience of their valid orders in their presence.[18] Nor does the

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[16] *I. e.*, her refusals with respect to (1) Glickson, (2) Kaplan, (3) Rothstein, (4) Alexander, (5) Strack, and (6) all co-defendants concerning whom she refused answers. See *supra*, pp. 8–10, 11–12.

[17] Petitioner does not question the validity of the civil contempt judgment. See *Yates* v. *United States*, 227 F. 2d 844, 848. At issue in that case was merely the continued vitality of the civil judgment after the termination of the principal trial.

[18] The various decisions cited by petition (Br. 29–31, 40–42) all deal with contempts committed outside the presence of the court.

proper construction of the contempt statute require that recalcitrant witnesses be left wholly undisciplined or only partially punished.

As we have pointed out (*supra,* pp. 22–24), to hold that the court's contempt power in this case was exhausted by its civil judgment after the events of June 26th would be drastically to diminish its authority to compel compliance with its orders. And it would be similarly obstructive to permit a witness like petitioner to "pick and choose" what questions she will answer and on what conditions, and by such tactics to prevent full development of the prosecution's case against her and her co-defendants (see *supra,* pp. 24–30). In sum, the court here exercised "the least possible power adequate to the end proposed" (*Anderson* v. *Dunn,* 6 Wheat. 204, 230–231).

II

SINCE THE PURPOSE OF THE CONTEMPT JUDGMENT WAS PUNITIVE RATHER THAN COERCIVE, THE IMPOSITION OF A CRIMINAL SENTENCE WAS PROPER

Also without merit is petitioner's contention (Br. 58–62) that the "dominant purpose" of the contempt judgment here in issue was "to coerce," "for the benefit of the plaintiff" (*i. e.,* the prosecution), answers to the questions which she had refused to answer (Br. 58, 61); that, in other words, the judgment was "essentially civil in character and purpose" (Br. 58),

with the alleged consequence that the judge "was without power to impose punitive punishment" thereunder (*ibid.*).

Almost any contempt of court has both civil and criminal characteristics. *United States* v. *United Mine Workers,* 330 U. S. 258, 298–299; *Lamb* v. *Cramer,* 285 U. S. 217, 220–221; *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 441–443; *Bessette* v. *W. B. Conkey Co.,* 194 U. S. 324, 329. A refusal to obey an order of the court is not only an affront to the authority of the court, but may also prejudice the case of the opposing party. If the incarceration to which a contemnor is sentenced has as its principal purpose the punishment of the offender in vindication of the court's authority and the deterrence of like derelictions in the future, and is of fixed duration, the contempt judgment is considered criminal in character. If on the other hand the recalcitrant is ordered to be held in custody solely for the purpose of coercing him to do what he has refused to do, and the confinement is directed to last only so long as the recalcitrance continues, the judgment is considered civil in nature. *Gompers* v. *Bucks Stove & Range Co., supra,* 221 U. S. at 441–443; cf. *United States* v. *United Mine Workers, supra,* 330 U. S. at 302–305. See also fn. 12, *supra,* p. 22.[19]

The judgment involved at bar had as its principal if not its only purpose the punishment of petitioner in vindication of the authority of the court, and so

[19] As we have seen (*supra,* pp. 22–23), both types of judgment may be imposed for the same contumacious act.

was properly made criminal in character.[20] On the very day on which the refusals in question occurred, Judge Mathes told petitioner and her counsel that he intended to treat the refusals as "criminal contempt" (*supra*, p. 14).[21] On the day of sentencing, both before and after imposing sentence, he made very clear, in repeated statements, that his purpose was to "vindicate" the "authority of the court" in punishment of petitioner's "defiance" of that authority (*supra*, pp. 15–16). The vindication of the authority of the court is, as we have pointed out, the normal and characteristic purpose of, and motivating factor in, a criminal contempt judgment (see *supra*, p. 32).

It is true, as petitioner stresses (Br. 60–61), that in sentencing petitioner Judge Mathes expressed the hope that she would "purge" herself of contempt (*supra*, pp. 15–16). But his use of this expression

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[20] That the judgment is in fact criminal in character is clear. The order and certificate was entitled in "criminal contempt" (*supra*, p. 4), the judgment and commitment referred to petitioner's having been "convicted of * * * criminal contempts" (R. 17), and the sentence was to a fixed term of imprisonment (*supra*, p. 4)—the hallmark of a criminal as distinguished from a civil contempt judgment (*supra*, p. 32). Petitioner, indeed, does not question that the judgment is criminal. Her contention is rather that the judge acted improperly in making the judgment criminal in character because his purpose, she claims, was not to *punish* her for her contumacious refusals to answer questions, but solely to *coerce* her to answer them.

[21] It is established practice for a trial judge to reserve punishment of contempts by participants in a criminal trial. *Hallinan* v. *United States*, 182 F. 2d 880 (C. A. 9), certiorari denied, 341 U. S. 952; *MacInnis* v. *United States*, 191 F. 2d 157 (C. A. 9), certiorari denied, 342 U. S. 953; *Sacher* v. *United States*, 343 U. S .1.

clearly did not indicate that the purpose of the sentence was, by coercing petitioner to answer the questions which she had refused to answer at the trial, to aid the Government in its capacity as prosecutor and party to the cause—the characteristic purpose of a civil contempt judgment (*supra,* p. 32). The judge was well aware that, as counsel for petitioner pointed out in the colloquy, the trial was over and the jury disbanded, so that it was then too late for petitioner, even if she were desirous of doing so, to comply literally with the judge's orders by answering the questions at that trial and before that jury. It is clear from the judge's remarks as a whole that he was merely giving expression to the hope that petitioner, by coming forward and answering the questions, notwithstanding that it was too late for such answers to be of any use at the trial, would thereby "[bow] to the authority of the court" (*supra,* p. 16). In other words, he was hopeful that petitioner, by coming forward and answering the questions before him in open court, even at that late date, would indicate a spirit of contriteness and regret for her previous refusals. If she did that, he said, at any time within the 60-day period within which he had the authority to modify the sentence (see Rule 35 of the Federal Rules of Criminal Procedure, *supra,* p. 3), he would "be inclined even at that late date to accept her submission to the authority of the court" (*supra,* p. 16). That is to say, he would in that event, because it would be the "humane, merciful thing to do under the circumstances," as he said (*supra,* p. 16; cf. *United States* v. *Hallinan,* 103 F. Supp. 800, 801–802 (N. D.

Cal.)), either reduce the sentence or possibly even suspend its execution. But this would be done, as pointed out by the Court of Appeals, solely as a matter "of grace" (R. 44).[22]

Petitioner points out, however (Br. 11–12, 57), that Judge Mathes at one time expressed the view, some time after the completion of the principal trial, that petitioner's answers to the questions of June 26th (see *supra*, pp. 7–11), which it was the purpose of the civil contempt judgment to coerce petitioner into supplying, still had "undeterminable potential value" to the Government as prosecutor because of the possibility that a new trial might be ordered in the principal case, which was then pending on appeal (R., No. 13527, pp. 17–18). This view of the judge, however, was rendered in a different proceeding from that here involved, and was given nearly a month following the imposition of the sentence here in issue.[23] There is no indication that this theory (*i. e.*, that the civil contempt judgment still had vitality

[22] It is not uncommon for sentences in criminal contempt to provide for a fixed term or until such time as the defendant might purge himself. See, *e. g.*, *Field* v. *United States*, 193 F. 2d 86, 88; 193 F. 2d 92, 94; 193 F. 2d 109 (C. A. 2), certiorari denied, 342 U. S. 894; *Lopiparo* v. *United States*, 216 F. 2d 87, 91 (C. A. 8), certiorari denied, 348 U. S. 916.

[23] The opinion to which petitioner refers was rendered September 3, 1952 (R., No. 13527, p. 20), at a later stage of the civil contempt proceeding. It was rendered in connection with the judge's decision that petitioner's confinement under the June 26th judgment should continue despite the termination of the principal trial and the consequent impossibility of petitioner's giving any further testimony therein. It was this aspect of the civil contempt judgment which the Court of Appeals reversed in *Yates* v. *United States*, 227 F. 2d 844. See fn. 3, *supra*, p. 5.

after the termination of the main trial)—which the court below rejected on appeal (*Yates* v. *United States*, 227 F. 2d 844)—in any way entered into the judge's thinking as of the earlier time when he imposed sentence in the present case. Indeed, the question at issue in that later proceeding had not arisen as of the time (August 8, 1952) of the imposition of the present sentence (see fn. 8, *supra*, p. 11). There is consequently no warrant for petitioner's attempt to relate this later-expressed view of the judge back to the time of sentence in this case as evidence that the sentence here involved was primarily coercive in its purpose. In any event, there can be no doubt, we believe, for the reasons hereinabove stated (*supra*, pp. 32–35), that the instant sentence was at least primarily punitive in its purpose. No more was required to justify the judge's imposition of a criminal punishment thereunder. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 443; cf. *McCrone* v. *United States*, 307 U. S. 61, 64.

III

PETITIONER'S SENTENCE TO ONE YEAR'S IMPRISONMENT WAS NOT EXCESSIVE IN THE LIGHT OF HER DELIBERATE AND REPEATED FLOUTING OF THE AUTHORITY OF THE COURT

Petitioner's remaining contention (Br. 51–58)—that her sentence to one year's imprisonment was of such "shocking severity" as to constitute a "manifest abuse of discretion" amounting to "cruel and inhuman punishment" (Br. 51)—is likewise untenable.

She does not dispute that the character and extent of the punishment imposable for contempt of court, where the contempt is committed in open court and consists of deliberate refusal to obey the judge's orders, are matters lying entirely within the judge's sound discretion. Neither does she dispute the settled principle that an appellate court will not interfere with the exercise of that discretion unless it has clearly been abused. Cf. *Fisher* v. *Pace,* 336 U. S. 155, 161; *Ex parte Terry,* 128 U. S. 289, 302–304; *MacInnis* v. *United States,* 191 F. 2d 157, 162 (C. A. 9), certiorari denied, 342 U. S. 953; *In re Maury,* 205 Fed. 626, 632 (C. A. 9). Her sole contention is that there was such an abuse of discretion in this case. We submit, however, that the one-year prison sentence which was imposed for the deliberate and repeated flouting by petitioner of the authority of the court which this record discloses (*supra,* pp. 11–14) was not excessive.

A sentence of up to one year's imprisonment is specifically authorized by statute for a witness' refusal to answer a single question pertinent to the matter under inquiry at a congressional committee hearing (2 U. S. C. 192). Indeed, a *minimum* sentence of one month is made mandatory by that statute, in addition to which a fine of not less than $100 nor more than $1,000 is mandatory for each such refusal. Prison sentences of as much as one year in one instance and 18 months in another have been imposed under that statute for refusals to answer committee questions. *United States* v. *Orman,* 207 F. 2d 148,

152 (C. A. 3); *United States* v. *Costello,* 198 F. 2d 200, 202 (C. A. 2), certiorari denied, 344 U. S. 874.[24] Under § 402 of Title 18, which, like § 401 (involved at bar), deals with contempts of court, and which specifically excepts from its coverage contempts committed in open court, sentences of up to six months' imprisonment or a fine of $1,000, or both, are imposable for each and every act of disobedience committed. Here, petitioner received a one-year sentence (and no fine) for multiple acts of disobedience.

The court below, in sustaining the sentence, did remark that it "was severe" (R. 47). But the court did not believe that the sentence was disproportionate to the seriousness of petitioner's offense, of which a mere reading of the cold record (cf. *Fisher* v. *Pace, supra,* 336 U. S. at 161; *Hallinan* v. *United States,* 182 F. 2d 880, 888 (C. A. 9), certiorari denied, 341 U. S. 952),—revealing as that is (*see supra,* pp. 11–14)—can convey no adequate appreciation. Petitioner's attitude throughout her cross-examination was, as remarked by the trial judge, one of "defiance of the authority of the court" (R. 27). That this attitude may have been dictated by what she conceived to be a conscientious duty to refrain from answering

[24] Petitioner points out that in "legislative contempts" the accused is entitled to a jury trial, unlike the accused in a summary contempt proceeding such as that involved at bar (Br. 55, fn. 22). The distinction has no present relevance, however. Petitioner's guilt of the offenses of which she stands convicted, and which were committed in open court, has been established according to the procedures prescribed for such contempts.

certain questions relating to her associates, notwithstanding that the relevance of those questions to the issues of the trial cannot be disputed (see fn. 11 *supra,* pp. 20–21), does not lessen the degree of her offense.

Petitioner, a defendant at a criminal trial, elected to take the witness stand in her own defense. She thereby waived the immunity to giving testimony which otherwise was hers. She sought, however, to make her waiver partial—to "pick and choose," as observed by the court below, the questions to which she would give answer (R. 47). But, as this Court has emphasized, the waiver of immunity by a defendant who takes the witness stand "is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing" (*Raffel* v. *United States,* 271 U. S. 494, 497). Petitioner willfully, and with full appreciation of the consequences of her action, sought to "determine what testimony to give and what to withhold", and thus to "transfer from the court to [herself] the management of the trial" (*United States* v. *Gates,* 176 F. 2d 78, 80 (C. A. 2)) with respect to all matters affecting her own cross-examination. That such usurpation by a party of the function of the court is not the trivial offense which petitioner would make of it, this Court has had occasion to remind:

> If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside,

> then are the courts impotent, and what the Constitution now fittingly calls the "judicial power of the United States" would be a mere mockery.[25]

Judge Mathes may well have believed, as indeed the record indicates was probably the case, that petitioner took the stand knowing full well that she would refuse answers to all prosecution questions which she should decide would be inconvenient to answer—that her refusals to answer were part of a course of conduct intended from the beginning to flout the court's authority if she deemed it appropriate.[26] Whether such was the case was for the judge to decide, as it was for him to take into account all other surrounding circumstances in fixing punishment. The sentence was not the product of haste or of the heat of altercation. It was imposed after due reflection, some five weeks following the happening of the events in issue, during which time petitioner, despite ample opportunity, had evidenced no willingness whatever to seek to purge herself. It was not excessive by the standards set by statutory and case law. There was no abuse of discretion.

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[25] *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 450.

[26] *Cf.* the observation of the court below in one of the related contempt proceedings: "If the trial judge believed the consistent refusal was part of a concerted action to bring into disrepute the jury trial as an instrumentality of democratic government, then it was his duty to punish and ours to affirm" (*Yates* v. *United States*, 227 F. 2d 848, 850).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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